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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 304

CITY OF VERNON, a Municipal Corporation, Et Al.,
Defendants-Cross-Complainants and Respondents,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Cross-Defendant and Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE, AND BRIEF IN SUPPORT OF PETITION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 204

CITY OF VERNON, A MUNICIPAL CORPORATION, ITS DEFENDANT OFFICERS AND EMPLOYEES,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

To the Honorable Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of Matter Involved

This is an action in equity instituted by the People of the State of California against petitioner herein and several other cities somewhat similarly situated to restrain them from maintaining without a permit from the Cali-

fornia Board of Public Health any sewage treatment works, sewer pipes or conduits, or other pipes or conduits for the treatment or discharge of sewage; to restrain the defendants in the trial court from discharging into any of the salt waters of the State any sewage, impure waters, or matters offensive, injurious or dangerous to the public health, and to restrain said defendants from maintaining a public nuisance in and about Santa Monica Bay by reason of their deposits therein of sewage and other matters offensive and injurious or dangerous to public health or deleterious to fish or plant life; and, further, for a judgment that the defendants be required to plan, finance, construct, operate and maintain sewage treatment works, sewer pipes and conduits for the safe and sanitary disposal of sewage; and for the abatement of a public nuisance.

The petitioner, City of Vernon, is a municipal corporation with its corporate limits abutting on those of the City of Los Angeles, and is situated southerly and easterly from the center of the City of Los Angeles. Through the years the City of Vernon has grown to such proportions that it might well be termed the "industrial hub of the west". The sewer problems of petitioner became acute about ten years past the turn of the century when the sewage flow increased to such proportion that it was no longer sufficient to dispose of such sewage by private means, or whatever means was most suitable to the individual. It then became necessary for petitioner to find some means for disposal of its sewage and it turned to the most feasible method that then presented itself. The City of Los Angeles had constructed and was operating an outfall sewer system, the capacity of which was greatly in excess of the foreseeable needs of the people of Los Angeles. Petitioner turned to the City of Los Angeles, seeking the use of this city's sewage system as a solution to its own sewage problem. Commencing in 1909, the City of Vernon made a

contract with the City of Los Angeles for the disposal of Vernon's sewage by connection to the Los Angeles system, whereupon the City of Los Angeles, for a cash consideration, undertook to dispose of some or all of the sewage originating within the corporate limits of the City of Vernon. Subsequent contracts were made by and between petitioner and the City of Los Angeles for the disposal of sewage, said contracts being made in the years 1925, 1931, and 1938, which latter contract is still in force. The contract of 1938 is noteworthy for the fact that it was for an indefinite term and in no instance carried with it any provision permitting the City of Los Angeles to cancel said contract when and if the City of Los Angeles required the use of that portion of the capacity of its outfall sewer system covered by the aforesaid contract.

In 1922 the City of Los Angeles applied for and was granted a permit from the California Department of Public Health to dispose of sewage into the Santa Monica Bay in the Pacific Ocean at Hyperion; and subsequently, pursuant to a permit granted January 6, 1923, constructed a treatment plant and submarine tube at Hyperion, which at all times since completion has been used by the City of Los Angeles for the treatment and disposal of all of the sewage disposed of by the Los Angeles Outfall Sewer System, including that sewage flowing in the Los Angeles Outfall from the petitioner herein, pursuant to its contract with the City of Los Angeles.

The treatment plant, sewer system and submarine tube at Hyperion, which was solely owned, operated and controlled by the City of Los Angeles was so inefficiently operated that on September 30, 1940, and for many years prior thereto sewage was permitted to be deposited into the waters of Santa Monica Bay, creating an unhealthy and unwholesome condition in and around the bay and beach, and on September 30, 1940, the State Board of Pub-

lic Health revoked the permit granted to the City of Los Angeles January 6, 1923, and subsequently the action involved in this proceeding was brought by the People of the State of California against the City of Los Angeles and petitioner, among others, to abate this nuisance and to permanently enjoin any and all of the defendants in the trial court from discharging sewage into the salt waters of the State. Petitioner herein was not required to secure a permit from the State Board for the discharge of sewage into the salt waters of the State but had secured a permit from said Board allowing petitioner to connect its sewer system with the Los Angeles sewer system. This permit was also suspended by the State Board. However, it was obvious that the City of Los Angeles and other cities which had contracted with the City of Los Angeles for disposal of their sewage had no other means for the disposal of sewage so the State Board granted to the City of Los Angeles a temporary permit for such disposal conditioned that the City of Los Angeles within one year of the date of said temporary permit prepare and file with the Board plans for the construction of adequate treatment works and outfall structures to eliminate the unhealthful conditions which the State Board had found to exist in the Pacific Ocean and at Hyperion Beach. This temporary permit was suspended on May 18, 1942. On December 13, 1943, the present action was instituted by the People of the State of California by the filing of a Complaint against the City of Los Angeles and other cities, including petitioner, for injunction and for statutory penalties, and other relief.

Petitioner concedes that a public nuisance was created and existed, and agrees with the findings of the Court in that regard.

Respondent's complaint was filed on behalf of the People of the State of California and on behalf of the State

Board of Public Health of the State of California, the Division of Fish and Game of the State of California, and the State Park Commission of the State of California, for the purpose of abating the public nuisance and correcting the conditions as therein alleged (R. 6).

The prayer of the complaint asked, first, for an injunction restraining all of the defendants below from maintaining without a permit from the State Board of Public Health any sewage treatment works, etc., for the treatment or discharge of sewage; second, for a judgment of one thousand dollars ($1,000.00) per day against each of the defendants, including their officers and employees, for each and every day that the defendants permitted or contributed to either the operation or maintenance of sewage treatment works, etc., without a permit from the State Board of Health, (this portion of the prayer was abandoned by respondent); third, that each of the defendants be permanently enjoined and restrained from discharging into any of the salt waters within the jurisdiction of the State any sewage or impure waters injurious or dangerous to public health; fourth, that each of the defendants be permanently enjoined from maintaining a public nuisance in Santa Monica Bay by reason of the discharge of sewage; fifth, that each of the defendants be enjoined from depositing into the waters of Santa Monica Bay substances dangerous to fish or plant life; sixth, that each of the defendants be required to plan, finance, construct, operate and maintain sewage treatment works, pipes and conduits for the safe and sanitary disposal of sewage and for the abatement of the public nuisance complained of in the complaint within a reasonable time to be fixed by the Court; and, seventh, for all other and further relief (R. 17-18).

It is noteworthy that Paragraph V (R. 9) of Respondent's complaint, which contained the allegation that each of the corporate defendants had entered into a contract

with the City of Los Angeles and had purchased an undivided interest in said plant and submarine tube and had made a lump sum payment to said City for such interest, was the allegation upon which was based the overruling by the Trial Court of petitioner's demurrer. Subsequently, at the conclusion of respondent's case, said allegation was stricken by the Court and the complaint was left without any allegation to the effect that the corporate defendants other than the City of Los Angeles had any right, title or interest in or to the Los Angeles Sewer System, the Hyperion Plant or the Hyperion Submarine Tube.

By its answer petitioner alleged that the Los Angeles Outfall Sewer System, the Hyperion Treatment Plant, and the Submarine Tube were owned in their entirety by the City of Los Angeles, which said City was the only one having any right to operate, maintain or repair the same or any portion thereof (R. 26). The answer further alleged that petitioner had contracted with the City of Los Angeles for the disposal of sewage originating within its corporate boundaries, and alleged that petitioner had no right or jurisdiction to make any repairs, replacements or changes of any nature whatsoever which concerned or affected the Los Angeles Outfall Sewer System, Treatment Plant or Submarine Tube, but that, on the contrary, the City of Los Angeles had undertaken and agreed by said contract to operate and maintain said sewer system, including the treatment plant and submarine tube, and to dispose of the sewage entering the same from the City of Vernon (R. 23-24). Petitioner's contracts with the City of Los Angeles were attached as exhibits to petitioner's answer (See R. 29, *et seq.*).

There were three primary questions presented to the Trial Court: First: Did the nuisance charged in Respondent's complaint exist, and if so, was it one which justified an injunction absolutely prohibiting the operation of the

instrumentality which was the direct and proximate cause of the nuisance regardless of the effect upon hundreds of thousands of inhabitants dependent solely upon the use of those facilities for the disposal of the sewage created by those inhabitants? Second: Was the nuisance, assuming one to exist, caused by the defendants other than the City of Los Angeles? Third: Did the Trial Court have the right, in charging defendants other than the City of Los Angeles with the responsibility for the existence of the nuisance, to disregard in their entirety each of the contracts made by the City of Los Angeles on the one hand and the various municipalities on the other hand for the disposal of the sewage originating within the boundaries of said municipalities?

The Trial Court found as conclusions of law, insofar as is pertinent to this petition, that the petitioner was and is maintaining a public nuisance in Santa Monica Bay by the discharge of sewage at Hyperion; that the primary duty and obligation rested upon petitioner and other corporate defendants to dispose of the sewage originating within its respective limits in a safe and sanitary manner; that any right created by contract between petitioner and the City of Los Angeles did not release petitioner from the primary obligation to dispose of sewage in a safe and sanitary manner; that regardless of the contractual relationship existing between petitioner and the City of Los Angeles the plaintiff was entitled to an injunction restraining each and all defendants, of which petitioner is one, from maintaining without a permit from the State Department of Public Health any sewage treatment works or other facilities for the discharge of sewage into Santa Monica Bay, such injunction to be effective on and after December 31, 1947; that the plaintiff was entitled to an injunction restraining petitioner from discharging into any of the salt waters within the jurisdiction of the State of

California any sewage or other matter or substance in any manner likely to be offensive, injurious or dangerous to the public health, effective on or after December 31, 1947. The Court further found that the plaintiff was entitled to a mandatory injunction requiring petitioner and its successors, officers, agents, servants and employees to plan, construct, operate and maintain sewage treatment works, pipes and conduits for the safe and sanitary disposal of sewage within as short a time as was feasible. The Court retained jurisdiction in order to make any other and further orders as necessary to insure the permanent abatement of the alleged public nuisance. Based upon a Finding hereinafter referred to, the Court found further that petitioner, if it did not adopt some approved method of disposal of sewage originating within its corporate limits other than through a new treatment plant or works at or near Hyperion, was required to advance its proportionate share according to the ultimate proportionate use reserved for petitioner towards the construction of a new treatment plant or works at or near Hyperion, *but also decreed* that petitioner was not prevented from adopting some other method of disposing of sewage originating in the corporate limits of petitioner provided such method was approved by the State Board of Public Health of the State of California and that such method was a safe and sanitary method of disposal of sewage, and provided that said plan or method was in full operation on or before the 31st day of December, 1947 (R. 80). The Finding hereinabove referred to was Finding No. XXXVI, which stated in part (R. 101):

> "That it was agreed by those present at a meeting of the City Engineers of the various cities . . . (See R. 318) that there be allocated to the defendants the ultimate capacity of said proposed . . . treatment plant . . . that the proportionate cost of each of the corpo-

rate defendants was based upon a total estimated cost of $21,000,000; and the cost to each corporate defendant was in the ratio of the gallonage allotted to 240 (240 million gallons per day being the capacity of the Los Angeles Sewer System) as the estimated share to be contributed by each corporate defendant is to 21,000,000; that said estimated share of expense was arrived at on the basis of the percentage ultimate flow in the new plant to the total cost thereof and without reference to any other obligations or liabilities as between the City of Los Angeles and the separate respective corporate defendants" (R. 168).

Finding XXX (R. 99), stated that:

"... City of Vernon could, at an additional expense far larger than their proportionate share of the construction of a new ... treatment plant, dispose of sewage arising in the corporate limits of said cities through the sewage system of the County Sanitation District. ..."

It is these two Findings upon which is based the alleged "alternative" decree which petitioner has set forth above and with which petitioner does not agree.

Judgment was entered in accordance with the conclusions of law (R. 106).

An appeal from this Judgment was taken by petitioner to the Supreme Court of the State of California, which transferred said appeal to the District Court of Appeal, Second Appellate District, Division One, which, on February 11, 1948, affirmed the Judgment of the Superior Court. The Opinion of the District Court of Appeal is reported in 83 Advance California Appellate Reports at page 794, 189 Pac. (2d) 489, and is printed in full in the Record (R. 289).

The main questions presented to the District Court of Appeal were:

1. That petitioner was not legally responsible for the maintenance of a nuisance, nor should they be held liable for the cost of abating such nuisance where the instrumentality causing the same was neither owned by, nor under the jurisdiction or control of petitioner.

2. That the Court, in a proceeding for the abatement of a nuisance, had no power to dictate or prescribe the means to be used or instituted to abate the nuisance.

3. That the Judgment violated the provisions of Article I, Section 13 of the Constitution of California and the Fourteenth Amendment to the Constitution of the United States in that its effect was to deprive appellants of their property without due process of law.

A petition for rehearing was filed in the District Court of Appeal and was denied without opinion on March 10, 1948. A petition for hearing filed in the Supreme Court of California was denied on April 8, 1948. The Judgment of the District Court of Appeal is now a final judgment and is the judgment of the highest court in the State from which a decision may be obtained. A stay of proceedings has been granted to petitioner herein by the said District Court of Appeal pending the outcome of this petition, said stay being conditioned upon the filing of a surety bond in the amount of $5,000.00, which bond has been filed

This Court Has Jurisdiction

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because:

1. The Federal question has been properly preserved in that the contention that petitioner had been deprived of property without due process of law was presented to and considered by the State Court.

2. The decision of the State Court is in conflict with a decision of the Circuit Court of Appeals (Eighth Circuit—July 7, 1902), (*Carmichael* v. *City of Texarkana,* 94 Fed. 561, 116 Fed. 845), and the precise question has never been decided by this Honorable Court.

3. The State Court has decided a Federal question of substance not theretofore determined by this Court in that, by the denial of the opportunity to present a valid defense to the action, petitioner is required to do that which it would otherwise not be required to do.

In its answer to the complaint in the action below, petitioner alleged that it had entered into a contract with the City of Los Angeles under the authority of certain acts of the California Legislature. By the provisions of this contract the City of Los Angeles agreed, for a specified consideration, to dispose of sewage originating within the corporate limits of petitioner. It is petitioner's contention that by virtue of this agreement petitioner lawfully transferred to the City of Los Angeles whatever obligation it had with reference to disposal of sewage. By reason of the Court's failure to receive the aforementioned contract in evidence, or to consider the effect thereof or to give said contract any force or effect whatsoever, and by reason of the Judgment and Decree of the State Court, petitioner has been deprived of its rights and benefits under said contract and has thus been deprived of property without due process of law.

4. A Petition to the Supreme Court for a writ of certiorari after a final judgment or decree has been rendered or passed by the highest court of the State in which a decision could be had is proper where "any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States . . ." (28 U. S. C. 344). Throughout the trial and various proceedings in the cause below petitioner has claimed that its contract and property rights have been protected by

the Fourteenth Amendment to the Constitution, and that the necessary result of the final judgment and decree in this cause has been to deprive petitioner of its property without due process of law.

5. The provisions of the California Health and Safety Code (Secs. 5414, 5418) which require petitioner to obtain a permit to empty sewage into Santa Monica Bay is an act by the State of California which impairs the obligation of petitioner's contract with the State of California and has the effect of rendering null and void a contract entered into by virtue of a power granted by the same legislature under the provisions of the Act of the Legislature of 1909 (Stats. 1909, Ch. 397, page 677), which provided in part:

"An act authorizing municipal corporations to permit other municipal corporations to construct and maintain sewers, water mains, and other conduits therein, also to construct and maintain sewers, water mains, and other conduits for their joint benefit, and at their joint expense, and to make and enter into contracts for said purposes."

"Sec. 4. Whenever the councils, or other legislative bodies of two or more municipal corporations shall find, and by resolutions adopted by them shall declare, that it will be for the interest or advantage of such municipal corporations so to do, such municipal corporations, by their respective city councils or other legislative bodies, may enter into a joint agreement authorizing the construction and maintenance of sewers, water mains, or other conduits situated in the streets or other public places of either or any of such municipal corporations, or in part outside of the limits thereof, at the joint cost and expense of, and for the joint use and benefit of, such municipal corporations, upon such terms and conditions and under such regulations, as may be approved by the city councils or other legislative bodies of all such municipal corporations; and the city council or other legislative body of each such municipal cor-

poration may bind and obligate such municipal corporation to pay such proportionate part of the cost of the construction and maintenance of such sewers, water mains, or other conduits, at such times and in such installments as may be so approved. All contracts for the construction of sewers, water mains or other conduits, under the provisions of this section shall be made and entered into by the one of such municipal corporation designated by the city councils or other legislative bodies of all such municipal corporations, and in the manner provided in section 3 of this act. Two or more municipal corporations may also, by their city councils, or other legislative bodies, enter into an agreement or agreements with each other for the joint use by such municipal corporations of any sewers, water mains, or other conduits theretofore, in whole or in part, constructed in the streets or other public places of either or any such municipal corporations, upon such terms and conditions as they may, by mutual agreement made by their respective city councils, or other legislative bodies, determine to be proper.

"Sec. 5. This act shall take effect immediately."

The Joint Powers Act (Stats. 1921, Chap. 363, page 542), which provided in part:

"Sec. 1. Two or more counties, two or more municipalities, or one or more municipalities, or one or more counties, by agreement entered into, respectively, by them and authorized by their legislative bodies, may jointly exercise any power or powers common to the several contracting parties;"

The Municipal Sewer District Act of 1939 (Stats. 1939, Chap. 24, page 37), which provided in part:

"Sec. 2. Whenever any municipal corporation shall enter into, or has heretofore entered into, a joint agreement with any other municipal corporation or with any county or sanitary district, under any law of this State, for the construction of sewers, including all

works and outlets necessary in connection therewith, or for the joint use, maintenance or operation by any such municipal corporation of portions of the works of such municipality or county or sanitary district or whenever in the judgment of the legislative body of such municipal corporation it is necessary or convenient for the proper sanitation of such district or districts to acquire, construct or complete any sewer or sewers therefor, or work for the treatment of sewage originating therein, including the acquisition of property and rights in sewer systems of counties or other municipal corporations or of sanitary districts, or any one or more thereof, necessary to enable the sewage of said district or districts to be gathered, treated and disposed of, such municipal corporations may create one or more districts within its territory, as hereinafter provided, to be taxed or assessed to pay the cost of such improvement, including the cost of the right to use the system, or part of the system, of works theretofore constructed or to be constructed by the other municipality or county or sanitary district, and it may issue and sell bonds of such district so created to pay the cost of the whole or any portion of such improvement. The works to be acquired and constructed and the rights to be acquired may extend beyond the territory embraced within said municipality or said district, and may include the entire cost and expense of the acquisition of flowage rights in outfall sewers and sewage disposal works of any such county or municipality or sanitary district."

"Sec. 4. Any such district may also be created when any contract has been made by a municipality of this State with another municipality, or county, or sanitary district, under any law of this State, providing for the joint construction, use or operation of a sewer system or of sewage disposal works and whenever the cost thereof has been paid or agreed to be paid by such contracting municipality and whenever the property in the district created as herein provided is specially benefited in the opinion of the legislative body

of such municipality as expressed in the ordinance creating said district by the construction, acquisition and completion, or use, of such sewers and outlets. All contracts made prior to the adoption and passage of this act between any two or more municipal corporations, or between any municipal corporation and any county or sanitary district, providing for the joint construction, use or operation of sewer systems, or sewage disposal systems, are hereby ratified and confirmed, and it is hereby declared to be the intention of the Legislature that a district may be created to pay or repay the whole or any portion of the cost of such improvement in accordance with this act whether such payment has heretofore been made by said municipality, or has been agreed to be paid by it provided only that the district to be taxed or assessed is specially benefited by said improvement."

"Sec. 19. This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety within the meaning of section 1, Article IV, of the Constitution of the State of California, and shall take effect immediately.

"The facts constituting the emergency are as follows:

"Certain cities in this State are so situated that the cost of constructing outfall sewers for the disposal of sewage would be prohibitive, and other adjacent cities have already constructed outfall sewers which can be used, and such cities desire to obtain rights to cross the territory of the cities so unable to construct such outfall sewers, and contracts have been made or are contemplated between such cities, and counties and sanitary districts. The disposal of sewage is of vital necessity to the inhabitants of any district in question and no delay in the acquisition or rights should be allowed or permitted. No act now adopted adequately provides for the creation of districts to acquire rights in other sewer systems and outside the boundaries of the districts, and this act is designed and intended to

clear up and settle questions pertaining to the powers of municipalities to contract for such rights and to impose the burdens upon territory specially benefited."

And the Municipal Sanitation and Sewer Enterprise Contract Act (Stats. 1947, Chap. 1470).

These acts expressly recognize the inability of certain municipalities to finance and construct their own sewage disposal facilities and expressly grant to such municipality the right to contract with another municipality for the disposal of such sewage.

6. There is a final judgment by the highest court in the State in which decision could be had. The appeal from the judgment was taken to the Supreme Court of California, which, under its power granted by the Constitution of California, Article VI, sec. 4(c), transferred said appeal to the District Court of Appeal, Second Appellate District, Division One. Said District Court of Appeal rendered its decision on February 11, 1948 (R. 289). A petition for rehearing was denied by said Court on March 10, 1848 (R. 206). Under the California Rules on Appeal the only further step to be taken in the State Courts was to file a "Petition for Hearing" in the California Supreme Court. This was done (R. 207). The Supreme Court refused to assume jurisdiction and denied said petition on April 8, 1948 (R. 353). The decision of the District Court of Appeal then became a final judgment, and it is that judgment to which this Writ is directed.

The Question Presented

Can the State Court refuse to recognize contracts made pursuant to legislative authority which would absolve petitioner of liability; and can the State Court require petitioner to abate a nuisance and desist from acting without a permit when such acts have been transferred to another by virtue of a contract which has been authorized by legislative act?

Reasons Relied on for Allowance of Writ

1. The State Court has decided a Federal question of substance not theretofore determined by this Court. The State Court has decided (R. 316) that despite the offer of proof and the offering of petitioner's contract into evidence, which contract would have constituted a complete defense to the respondent's complaint, petitioner has not been unlawfully deprived of property without due process of law.

2. The effect of the judgment and decree in this cause is to impair or alter the obligations contained in petitioner's contract with the City of Los Angeles and to substitute a different and more onerous burden upon petitioner and to the extent that the judgment and decree of the State Court increases petitioner's obligations, petitioner has been deprived of property without due process of law.

Although the Court technically has given petitioner the alternative of providing its own sewage disposal system rather than contribute funds for the construction of a sewage system by the City of Los Angeles, this alternative is only apparent and not real since construction of its own sewage disposal system by a municipal corporation situated as is petitioner is a practical impossibility for the reason that the cost of any alternative would be greatly in excess of even the contribution to the Los Angeles System, which, in turn, is greatly in excess of the amount petitioner is obligated under its contract.

The impossibility was recognized by the California Legislature in those acts authorizing municipalities to enter into contracts for the disposal of sewage. By the Act of 1909 (Stats. 1909, p. 677), The Joint Powers Act (Stats. 1921, p. 906), The Municipal Sewer District Act of 1939 (Stats. 1939, Ch. 24), The 1945 Amendment to Stats. 1909,

p. 677 (Stats. 1945, Ch. 249), and The Municipal Sanitation and Sewer Enterprise Contract Act (Stats. 1947, Ch. 1470), the California Legislature expressly granted to municipalities the power to contract with another city for disposal of sewage.

The Legislature has said that one municipality may contract with another in order to relieve itself of liability for the disposal of its sewage.

How, then, can the Court say that these contracts are not material in determining who is liable for the maintenance of a nuisance where it is found that the City of Los Angeles has the sole ownership, control and management of the sewage disposal facilities?

3. The judgment and decree in this cause involving the substantial Federal question is in conflict with the decision of the Circuit Court of Appeals, (Eighth Circuit, July 7, 1902) in the case of *Carmichael* v. *City of Texarkana*, 116 Fed. 845, and the Supreme Court should determine this question.

In the *Carmichael* case, *supra*, a case in which the facts were closely similar to those in the above cause, it was clearly held that the test of liability for the acts of another is the power to command or control the manner of the performance of those acts.

In the cause before this Court the undisputed facts were that petitioner had absolutely no power, command, or control over the manner of performance of the acts constituting the nuisance. Indeed, this is also shown by the fact of striking respondent's Paragraph V from the Complaint, leaving said Complaint without any allegation of petitioner's ownership or control of respondent's sewer system (R. 153 to 156).

4. The provisions of the Health and Safety Code of the State of California, upon which this action was based, im-

pairs the obligation of contract between the petitioner and the State of California in that said provisions require a permit from the State Board of Public Health for the disposal of sewage by a municipality even though the several municipal sewer district acts heretofore referred to permit and empower municipalities, as petitioner, to contract with another municipality for the disposal of its sewage (California Health and Safety Code, sections 5414, 5415, 5418).

The judgment of the State Court enjoins the petitioner from emptying any sewage without a permit from the State Board of Health into the salt waters of Santa Monica Bay.

No permit had ever been required of petitioner for this purpose, and petitioner had been empowered to obviate the necessity for this permit by contracting for the disposal of its sewage. The passage and enforcement of the provisions of this code then operate to impair the obligations of petitioner's contract, in violation of Article I, Section 10, of the Constitution of the United States.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the District Court of Appeal of the State of California commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said District Court of Appeal had in the case numbered and entitled on its docket—"No. 2nd Civil 15691, *The People of the State of California, Plaintiff and Respondent,* v. *City of Los Angeles, et al., Defendants and Appellants,*" to the end that this cause may be reviewed and determined by this Court, as provided for by the Statutes of the United States; and that the judgment herein of the said District Court of Appeal of the State of California,

Second Appellate District, be reversed by the Court; and for such further relief as to this Court may seem proper.

Dated: June 30, 1948.

JOHN B. MILLIKEN.

THOMAS V. CASSIDY,
EDWARD R. YOUNG,
JOHN F. O'HARA,
JOHN W. SHENK, III,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 204

CITY OF VERNON, A MUNICIPAL CORPORATION, ITS DEFENDANT OFFICERS AND EMPLOYEES,

Petitioner and Appellant below,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below

The opinion of the District Court of Appeal of the State of California, Second Appellate District, is reported in 83 Advance California Appellate Reports (A. C. A.) 794, in 189 Pac. (2d) 489, and is printed in full in the record (R. 289).

Jurisdiction

1. The date of the judgment to be reviewed is February 11, 1948 (R. 289). Said judgment became final on the denial of the Petition for Hearing by the Supreme Court of California on April 8, 1948 (R. 353).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Section 237, 28 U. S. C. 344(b). The District Court of Appeal of California has decided a Federal question of substance not theretofore determined by this Court (Supreme Court Rule 38(5)(a)), and has denied petitioner a right, privilege and immunity which petitioner set up under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

This has already been stated in the preceding petition under I (pp. 1-10, inc.), which is hereby adopted and made a part of this brief. Reference is also made to the statement of facts in the Petitioner's "Appellants' Opening Brief," and to the statement of facts contained in the opinion of the District Court of Appeal (R. 289).

Specifications of Error

I.

The District Court of Appeal of California erred in holding that the Trial Court rightfully refrained from passing on any of the rights, obligations or liabilities affecting petitioner by reason of its contractual relation with the City of Los Angeles.

II.

The Court erred in holding that all of petitioner's rights were preserved to them and that the judgment does not impair or violate any of their constitutional rights.

III.

The Court erred in holding that because the Trial Court's judgment afforded an alternate means of complying with

said judgment said Trial Court did not act in excess of its jurisdiction.

ARGUMENT

I

The District Court of Appeal erred in holding that the Trial Court rightfully refrained from passing on any of the rights, obligations or liabilities affecting petitioner by reason of its contractual relation with the City of Los Angeles.

It is contended that the State of California has deprived petitioner of property without due process of law in that by the action of its judicial officers petitioners have not been permitted to show non-responsibility for the acts charged. It has been many times stated that the Fourteenth Amendment is a restriction on State action. As was said in *Shelley* v. *Kraemer*, — U. S. —, 92 L. Ed. 845, 852, "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment." (Citing *Virginia* v. *Rives*, 100 U. S. 313, 318; *Ex Parte Virginia*, 100 U. S. 339; *The Civil Rights Cases*, 109 U. S. 3, 11, 17; *Twining* v. *New Jersey*, 211 U. S. 78; *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 680, and cases cited in footnote 14 on page 853 of 92 Lawyers Edition.)

As was said by Mr. Justice Brandeis in the *Brinkerhoff-Faris Trust and Savings Bank case, supra:* "The federal guaranty of due process extends to State action through its judicial as well as through its legislative, executive or administrative branch of government."

In denying the contention of petitioner that the judgment of the Trial Court deprived petitioner of property without due process of law, the District Court of Appeal gave as its reason for so doing that this was "a proceeding initiated by the People of the State of California on behalf of the State itself, and on behalf of the State Department of Public Health, as well as other State agencies . . . to abate a public nuisance" (R. 315). The Court held that the rights of petitioner with the City of Los Angeles were properly preserved for future adjudication in a proper proceeding (R. 688).

As was pointed out to the Court below, the case of *Carmichael* v. *City of Texarkana, et al.*, 94 Fed. 561, 116 Fed. 845, decided by the Circuit Court of Appeals, sets forth the general rule with respect to liability and the enjoining of persons for the maintenance of a nuisance. *The power of control is the test of liability.*

It was conceded by the Court below that petitioner had no right of management or control over the treatment works or outfall sewer, and that if petitioner had attempted to assume any jurisdiction over said treatment plant, said attempt would have been rebuffed (R. 292).

The facts in the *Carmichael* case, *supra,* are closely analogous to those in the present controversy. So close, in fact that petitioner contends that the rules of law established therein conclusively uphold petitioner's contention in this petition.

In that case, at the behest of certain property owners of the City of Texarkana, the city constructed a sewer system for the purpose of disposing of the sewage from said property owners and, after gathering the same into the main sewer, led said sewage to a small stream at a point a short distance over the line from Arkansas into Texas. Plaintiff owned the lands in Texas whereon said sewage drained. The complaint joined the City of Texarkana, the

water company of said city, and eight citizens of the State of Arkansas, each of which was a resident of the City of Texarkana. The citizens were charged with owning property connected to the sewer by laterals. The complaint alleged that all of the defendants were using said sewer lines, mains and laterals, for the disposal of sewage, with the result that a cesspool was created at the end of the sewer and the sewage was carried by the stream onto the lands of the plaintiff and thereby caused the nuisance complained of. The complaint asked for the abatement of the nuisance and for damages.

The Trial Court sustained demurrers as to all defendants other than the defendant city upon the grounds that none of the defendants except the city had any interest in or connection whatever with the transaction set out in the complaint and that there was a misjoinder of parties defendant. A demurrer containing these same grounds was filed by petitioner in the Trial Court and overruled. The comments of the Federal Court in the *Carmichael* case are so relevant that we deem it proper to quote from that case the part thereof which was presented to the District Court of Appeal.

> "The general rule that persons who either by their joint or by their several acts or omissions create or maintain a nuisance, such as the obstruction of a way or the pollution of a stream, are jointly and severally liable for such damages as are the direct and probable consequences of the nuisance is conceded (Citing cases).
>
> "Counsel for appellants rely upon this proposition, but its applicability to the facts of this case is not perceived. The demurrants petitioned their city for a sewer system, agreed to use, and have used it. The injuries which the complainants suffer were not the natural, direct, or probable consequence of these acts. *If they had taken their own sewage to the creek, and*

poured it into its waters above the premises of the complainants, they would undoubtedly have fallen under the rule, and would have been liable for any injury which the appellants suffered from their acts. On the other hand, if they had made an agreement with an independent contractor for a stipulated annual compensation to remove all their sewage from their premises to a place where, and in a manner in which, it could do no unnecessary injury to any one, and their contractor had carelessly deposited it on the complainants' land, or in the stream above their property, *the demurrants would not have been liable for these wrongful acts of their contractor.* Their relation to the city and to its negligence is not of a different character. They had no right or authority to construct or operate a sewer system in the city of Texarkana, nor had they any control over the manner of its construction, modification, repair or operation. All this control was vested by the laws in the municipality. Nevertheless, the statutes gave them the right to have the sewage from their premises removed by means of a sewer system constructed and operated by their city. If that system were lawfully, skillfully and carefully built and operated, it would entail no injury upon the complainants, or upon any other parties. The law vested the power in, and imposed the duty upon, the city of Texarkana, and upon that city alone, to construct and operate such a system within the bounds of that municipality, and required it to do so in such a manner that no unnecessary injury would be inflicted upon any one. * * * The demurrants never requested or authorized the city to inflict injury upon the complainants, or to be guilty of negligence or lack of skill in the discharge of its duty * * * the demurrants had no control over the manner of this construction. They have no right to change the sewer, no direction of its operation, and, since they have no control over its construction, operation or repair, *they cannot be liable jointly with the city for the wrongful acts of which it alone was guilty, and which it alone had the power to do or refrain from*

doing. The power of control is the test of liability. If one has no power to command or direct another in the performance of an act charged, he cannot be liable for the manner in which it is done, either alone or jointly with the actor" (Emphasis ours) (Citing cases).

"On page 851 the court is quoted as follows:

"The same considerations which exempt the demurrants from liability with the city for its negligence constitute them improper parties to this suit for an injunction. It is not their acts in depositing their sewage in the conduit which the city has provided for them that are the proximate cause of the continuing injury to the complainants. *It is the negligence of the city in the construction and control of the main sewer, which it was the duty of the city to so construct and operate that no nuisance would be created.* * * *

"This conclusion has not been reached without a careful consideration of the broad averments in the bill that the demurrants and the city, acting together in concert at the same time, have, by means of the open sewer and its use, created and maintained this nuisance, and that they have not ceased to do so. If these allegations stood alone, they would undoubtedly charge these citizens with liability; but they are accompanied with averments that the demurrants invoked the power of the city to construct the sewer, that the city was guilty of gross negligence in building it, and that the demurrants had used, occupied, and operated it 'by authority of, under, and from the city.' When all these statements are read together with the statutes which vest the right to construct, to change, to repair, and to control this sewer exclusively in the city, there is no escape from the conclusion that the acts and omissions of the city, and not those of the citizens, constituted the proximate cause of the injury to the complainants, and that the inhabitants who requested the construction and operation of the improvement are not liable for those acts and omissions, because they had

no power to command or control the city in their performance" (Emphasis ours).

"So many of the arguments made by plaintiff State of California in the case on appeal are identical with or similar to those made by plaintiffs' counsel in the *Carmichael* case that we feel justified in quoting the court's answers to those arguments. Quoting from the trial court's decision, 94 Fed. 561, the court at page 565, said:

"* * * The pleader seems to have had in mind, in drafting the bill, that it was the operation of the sewer system that created the nuisance, and that as the defendants other than the city were using the sewers for depositing their drainage, they, in common with all others so using them, were alike liable for any damages sustained by plaintiffs by reason of the city carrying and depositing the sewage in the stream which ran through their premises. In a certain sense it is true that the use of the sewer by the people of the city creates a nuisance. If the sewer was never used, there would be no offensive matter deposited, and if the water was not furnished by the water company there would be no vehicle to convey and deposit the filth on plaintiffs' land; but the sewer system was created, in pursuance of public law, by the city, for the very purpose of carrying off its sewage. *In its construction neither the water company nor the other defendants to the suit are shown to have had any control or interest.* The city undertook to construct, manage, and operate the sewers in such a way as to dispose of whatever sewage was deposited in them, in pursuance to lawful authority. Neither those who use the sewers *nor the water company* had anything to do whatever with the operation, control, or management of the sewers." (Emphasis added.)

"Counsel for the State of California argued repeatedly to the trial court that the defendant municipalities sanitation districts (which we have referred

to as 'public corporations') and the other corporate defendants were each responsible for the maintenance of the nuisance and for the unhealthful conditions which were shown to exist in the waters of Santa Monica Bay, and on the shores adjacent thereto. They argued that the question of ownership or of the control over the operation and maintenance of Los Angeles' Outfall Sewer System, treatment plant and submarine tube, were immaterial and that on the contrary it was the fact of the contribution of sewage jointly by each of the defendants for which all of the defendants were jointly and severally responsible, and for which they could be jointly and severally held liable to abate the same. That same argument was made by plaintiffs' counsel in the *Carmichael* case, and caused the District Court to devote a considerable portion of its decision to a digest of the cases where the same claim had been made. Several of the decisions digested were those treating with nuisance actions where several defendants acting separately bring about a condition which cumulatively causes the damage or creates the nuisance. As to that class of cases, as distinguished from the *Carmichael* case, the court had the following to say on page 567:

"* * * It will be seen, therefore, that the act of each one of these defendants is his separate and independent act, and that, if he could be held liable at all, he could only be held to the extent that he had contributed to the nuisance, and that the difficulty of determining that is no reason why he should be held liable for the whole nuisance. The object of this bill is to restrain the city from continuing the use of its sewer system and dumping the sewage of the city on the premises of the plaintiff, and to recover such damages from the city and its co-defendants as plaintiffs have suffered by reason of the nuisance complained of. It is clear, in view of the decisions above quoted, that no judgment for damages can be recovered against the defendants other than the city for the reasons heretofore

stated. Assuming, therefore, for the sake of the argument, that all of the defendants may be joined for the purpose of restraining further use of the sewer, and for the abatement of the nuisance complained of, it is nevertheless apparent that the other defendants joined with the city cannot be united in this suit for the purpose of recovering a judgment in damages against them, and for the reasons stated in the cases heretofore cited. But is it true that the allegations in the bill would authorize an injunction against any of the defendants except the city? *They are not engaged in operating the sewer. They are not engaged in depositing sewage of the city in the stream which flows through the plaintiff's premises.* They simply connect with the sewer, and deposit their sewage in it, which the city undertakes, independently of them, to convey away. The bill does not ask that they be enjoined from depositing their sewage in the city's sewerage system, nor does it allege any facts which would warrant such relief. It simply prays for an injunction against the said defendants, abating the said open sewer, cesspool, and nuisance, and for judgment for damages. But, as shown, *the defendants other than the city neither constructed the sewer, nor do they manage, control, or operate it, nor have they created the cesspool or nuisance complained of, nor are they keeping or maintaining it.* They are simply doing that which the law authorized and compelled them to do, namely, dumping their sewage into the sewer system of the city." (Emphasis added.)

The District Court of Appeal commented on the above case at some length but attempted to distinguish it on the ground that the "other defendants" were inhabitants and not municipal corporations and that, therefore, the above cited case and others therein cited did not apply.

This ruling has the effect of eliminating from the defense, which every defendant has a right to present, whether human or a creature of the State, the showing that peti-

tioner could not have abated the nuisance had they alone been forced to, and is also making a distinction without a difference between the present action and the *Carmichael* case. Petitioner contends that the several defendant cities in this action are in *pari causa* with the inhabitants involved in the *Carmichael* case, *supra,* in that petitioner and its co-defendant cities had made agreements for the disposal of their sewage, had turned over whatever obligation there was for such disposal, and had relinquished all power of control or maintenance or power to abate any nuisance caused thereby to the other contracting party.

There is no substantial difference between the liability of a person and the liability of a municipality for a nuisance created by the disposal of sewage. Both must do it so as to injure no one and both may be enjoined from so doing. How, then, in good logic can one court say, as was said in the *Carmichael* case that there is no liability because the power of control has been lost, and another court, as in this case, say that there is liability even though the power of control is completely lost.

There now exists in the several jurisdictions of these United States two different, diametrically opposite, conclusions and rules of law with respect to the same or similar set of facts. The Circuit Court of Appeals in the *Carmichael* case, New York in *Chipman* v. *Palmer,* 77 N. Y. 51, Alabama in *Adler* v. *Pruitt,* 169 Ala. 213, 32 L. R. A. (N. S.) 889, and North Carolina in *Hampton* v. *Spindale,* 210 N. C. 546, 187 S. E. 775, all hold that the test of liability is control, while California, if this decision is allowed to stand, holds that the element of control is of no consequence, that petitioner is to be held liable without fault, and that petitioner is to be prevented from showing its lack of responsibility for the acts charged.

It is submitted that in refusing to admit evidence showing lack of responsibility and in refusing to conform to the

great weight of authority, the California Courts have created a situation which should be decided by this Honorable Court in order to determine this question of great public importance and to create uniformity between and among the Federal and the several State Courts.

II

The Court erred in holding that all of petitioner's rights were preserved to them and that the judgment does not impair or violate any of their constitutional rights.

The theory of the complaint in this case was twofold. One, the charge of the operation of sewage treatment works, sewer pipes and conduits, and the discharge of sewage into the salt waters of the State without a permit; and, two, the seeking to restrain the maintenance of a public nuisance.

The first cause of action was based upon the provisions of the California Health and Safety Code, sections 5414 and 5418, which are, as follows:

> "5414—No person, without a permit, shall construct, excavate or maintain, any privy, vault, cesspool, sewage treatment works, sewer pipes or conduits, or other pipes or conduits, for the treatment and discharge of sewage or impure waters, gas, vapors, oils, acids, tar, or any matter or substance offensive, injurious, or dangerous to health, whereby they shall do any of the following:
>
> "a) Overflow lands.
>
> "b) Empty, flow, seep, drain, condense into or otherwise pollute or affect any waters intended for human or animal consumption or for domestic purposes, or any of the salt waters within the jurisdiction of this state."
>
> "5418—No person, without a permit, shall deposit or discharge any sewage, trade wastes, or any animal,

mineral, or vegetable matter or substance, offensive, injurious, or dangerous to health in any of the salt waters within the jurisdiction of this state."

The California Health and Safety Code was promulgated in 1939. The provisions pertinent to the issues in this cause were lifted out of the California Public Health Act (Stats. 1907, Ch. 492, as amended by Stats. 1911, Ch. 339, p. 565; Stats. 1913, Ch. 374, p. 796; Stats. 1917, Ch. 600, p. 920; Stats. 1935, Ch. 649, p. 1797), which Act was not repealed but remains in full force and effect. Said Public Health Act does not, by its provisions, require any person, city, town or corporation, to first obtain a permit from the Department of Public Health prior to connecting up its sewer pipes and conduits with those of another municipality. It therefore follows that by the enactment of the Health and Safety Code of the State of California, the State for the first time required permits to be obtained from said State Board prior to engaging in the method of sewage disposal here under discussion, namely, the connecting up with another system which was operating by virtue of a permit.

The petitioner, City of Vernon, has been and was operating its sewer pipes, conduits and mains, and draining sewage originating within its corporate limits into the Los Angeles System by virtue of its contracts with the City of Los Angeles beginning in the year 1909, and as finally modified and rewritten in 1938 and approved by the Legislature.

This contract was entered into by virtue of the power granted to all municipalities by the Act of 1909, (Stats. 1909, p. 677) and the Joint Powers Act, (Stats. 1921, p. 542). In addition to the powers granted to municipalities to contract with other municipalities for the disposal of sewage, the California Legislature, in 1939, passed the Municipal Sewer District Act of 1939 (Stats. 1939, Ch. 24),

which ratified all existing contracts by municipalities for disposal of sewage and reaffirmed the power theretofore granted. None of these acts required the municipalities desirous of availing themselves of the benefits of these acts to first obtain a permit from the State Board of Health.

It follows, then, that the enactment of the California Health and Safety Code, which required petitioner to obtain a permit to connect up with the Los Angeles Sewer System, and the subsequent revocation of this permit by the State Board under the Code is an act of the State Legislature impairing the obligation of petitioner's contract with the State of California. Indeed, the Health and Safety Code has impaired a contract which the selfsame legislature empowered petitioner to make, and by subsequent legislation still empowers such municipalities to make.

Petitioner's contention that the enactment of the provisions of the California Health and Safety Code which require petitioner to obtain a permit for that which it was already lawfully doing impairs the obligation of its contract with the State is borne out by the case of *Russell* vs. *Sebastian*, 233 U. S. 195. In this case the California Constitution granted to the Economic Gas Company the right to dig ditches and lay pipe on and in the streets of Los Angeles for the transmission of gas. The company entered upon the construction of such work pursuant to its grant. Subsequently, the State Legislature amended the Constitution, giving municipalities the power to license and set up their own system of regulations. Pursuant to this amendment, the City of Los Angeles passed an ordinance prohibiting anyone from digging ditches or laying pipe on or in the streets of the city without first obtaining a license and permit to do so from the city. The plaintiff in error proceeded to excavate a city street without benefit of a city permit and was arrested under the provisions of the municipal ordinance.

Plaintiff in error sought a writ of *habeas corpus* in the California Supreme Court, which was denied. This Honorable Court reversed that decision, holding that the constitutional provision set up a contract between the State and the Gas Company, and that the company was acting under that contract. The amending of the Constitution operated to impose a burden on the grant or right in that it required the company to do something that it was theretofore not required to do, and was therefore an act of the State impairing the obligation of contract in violation of Section 10 of Article I of the Constitution of the United States.

On page 204 of the above report, the Court said:

> "That the grant, resulting from an acceptance of the state's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court."

It is contended by petitioner that by its acceptance of the State's offer to enter into a contract with another municipality for the disposal of its sewage there was thereby created a contract which vested in petitioner a right protected against further state action which would impair that right.

It might be contended that petitioner, being a municipal corporation, can hold only those powers which are granted to it by the State. However, as was said in *Owensboro* v. *Cumberland T. & T. Co.*, 230 U. S. 58, the police power may reasonably regulate the public health, morals and safety, but it cannot destroy a vested contract or right. And although the grant was in general terms and of a general character, when accepted by the municipality it become a contract.

Especially is the foregoing true when the grant is for the purpose of permitting or inducing the city to act in its

proprietary capacity. Were the petitioner acting in its governmental capacity, it might be argued that the sovereign may take away or grant powers to a satellite at will. Most of the cases dealing with the question presented turn on this point and the general rule is many times reiterated that cities are mere political subdivisions of the State, derive their power from the State, and can have only those powers granted by the State, and that governmental powers delegated to municipalities may also be taken away.

In order for petitioner herein to contest the action of the Court and Legislature it must show that it was acting in its proprietary capacity. Of course, the general and universal rule with respect to cities acting in their governmental capacities is that the State may give powers to or take powers away from the municipality at will and the municipality has no recourse. However, the rule is different when the City is acting in its proprietary capacity.

Petitioner strongly urges that the facts in this case show that the City of Vernon was not acting in its governmental capacity.

The Court below has held that petitioner may be enjoined. That is an indication itself that the Court predicated its conclusion upon the theory that the city was acting within its proprietary capacity. Cases in this Court are numerous holding that cities cannot be enjoined from maintaining a nuisance where they are acting in a governmental capacity, that they are then exercising their police power and are acting in a quasi-judicial manner.

After stating that the power of the legislature is omnipotent where the municipality is acting in its governmental capacity, the Court, in *Hunter* v. *Pittsburgh*, 207 U. S. 161, said at page 179:

> "It will be observed that, in describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property

held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts. (*Dill. Mun. Corp.*, 4th ed., Secs. 66 to 66a, inclusive, cases cited in note to *State ex rel. Bulkeley* v. *Williams*, 48 L. R. A. 465), and it has been held that, as to the latter class of property, the legislature is not omnipotent. If the distinction is recognized it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. Mr. Dillon says truly that the question has never arisen directly for adjudication in this court. But it and the distinction upon which it is based have several times been noticed. *Tippecanoe County* v. *Lucas*, 93 U. S. 108, 115, 23 L. ed. 822, 824; *Meriwether* v. *Garrett*, 102 U. S. 472, 518, 530, 26 L. ed. 197, 206, 210; *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334, 342, 35 L. ed. 446, 449, 11 Sup. Ct. Rep. 790; *New Orleans* v. *New Orleans Waterworks Co.*, 142 U. S. 79, 91, 35 L. ed. 943, 947, 12 Sup. Ct. Rep. 142; *Covington* v. *Kentucky*, 173 U. S. 231, 240, 43 L. ed. 679, 682, 19 Sup. Ct. Rep. 383; *Worcester* v. *Worcester Consol. Street R. Co.*, 196 U. S. 539, 551, 49 L. ed. 591, 596, 25 Sup. Ct. Rep. 327; *Graham* v. *Folsom*, 200 U. S. 248, 50 L. ed. 464; 26 Sup. Ct. Rep. 245."

Petitioner has found no decision of this Court directly defining the difference between the governmental and proprietary capacities of cities, but contends that the petitioner herein, in contracting for the disposal of sewage, was acting within its proprietary capacity for the reasons that:

1. There is no duty imposed on a municipality for the disposal of sewage even though it has been granted

the power to construct and maintain sewers. In the absence of a mandatory legislative act imposing the duty, the prevailing rule is that the municipality is the sole judge of the necessity or desirability of sewers and drains. *Columbia* v. *Brook,* 214 U. S. 138.

2. The test in some jurisdictions is that of the interest of people outside the city. Thus the court, in *Ostrander* v. *City of Lansing* (1897), 70 N. W. 332, held that: "the sewers of the city, like its works for supplying the city with water, are the private property of the city; they belong to the city. The corporation and its corporators, the citizens, are alone interested in them. The outside public, or people of the state at large, have no interest in them, as they have in the streets of the city, which are public highways." (From *City of Detroit* v. *Corey,* 9 Mich. 165.) "It may be added that as to the sewers constructed under the charter by the City of Lansing they may be also a source of revenue."

See, also, *Barron* v. *City of Detroit,* 94 Mich. 601, 54 N. W. 273; *Baker* v. *City of Grand Rapids,* (Mich.) 69 N. W. 740.

3. The general rule as to the test of the governmental or proprietary nature of the city's activity includes several criteria; whether there is the duty to provide the particular facility; whether it is an activity from which is derived revenue; whether the function is performed for state and general public or merely for local benefit. Generally, where there is no duty to provide sewage, as in California, where revenue is derived from the operation of a sewer system and where the function of disposing of sewage by contract is for the sole benefit of persons within the city, the courts have held under any one of these tests that the city is operating in its proprietary capacity and therefore owns property or a property right which cannot be taken without due process of law.

It is submitted that there is no duty placed upon petitioner to dispose of its sewage, that said petitioner has the power granted to it to establish a system of sewers and drains but is not required to do so; and that the system of drains and sewers is solely for the benefit of the people within the limits of petitioner and in no way is comparable to the street and highway rule regarding municipalities.

It appearing that petitioner was acting in its proprietary capacity, and, under a grant of the State Legislature had accepted said grant and had changed its position in reliance thereon, a contract between the city and the State was thereby created, the obligation of which could not be impaired by subsequent legislation such as was done by the enactment of the California Health and Safety Code one year subsequent to the date of petitioner's last contract made by virtue of the power granted by the State Legislature.

III

The Court erred in holding that because the Trial Court's judgment afforded an alternate means of complying with said judgment, said Trial Court did not act in excess of its jurisdiction.

It is conceded by the State Court that the Court has no jurisdiction to issue a mandatory injunction requiring petitioner to expend large sums of money in paying for a part of the new treatment plant and submarine tube to be constructed by the City of Los Angeles (R. 310). The State Court holds that this defect is remedied by the clause in the judgment that petitioner is not prevented from adopting some other method of sewage disposal if such plan or method is approved by the State Board of Health.

Does it make any difference, then, that this invalid decree is allegedly validated by a clause providing that this

payment only need be made if petitioner so elected and that said decree did not prevent petitioner from making other arrangements for the disposal of sewage where it has been shown, and the Trial Court has found, that petitioner has no other plan and has no means of financing either the payment required to be paid to the City of Los Angeles for its construction of the new treatment plant or of financing any other system of sewage disposal? (R. 101).

Petitioner contends that such a decree cannot be valid where the alternative provided is a practical impossibility. Already, if petitioner is compelled to comply with the judgment, it will be forced to expend under the original judgment close to one million dollars. If the judgment should be modified to include the inflated cost of the treatment works, the cost to petitioner will be between one and a half and two million dollars.

It was found that if petitioner elected to take under the "alternative" the cost would be several times greater than that of entering into the Los Angeles System.

Petitioner submits that in so far as the court is requiring petitioner to pay for the building of a treatment plant which will be owned and controlled exclusively by the City of Los Angeles that that is a taking of property without due process of law. Petitioner has not had its day in court in that a valid defense to an action was not permitted to be presented.

This situation is closely analogous to the situation wherein a court prohibits the introduction of any testimony showing that an alleged criminal had a perfectly good alibi. Certainly this could not be considered to be fairness and justice under the law and would certainly be grounds for attacking the judgment in that the defendant had been denied his liberty without due process of law.

Petitioner has been charged with the maintenance of a nuisance and has offered its defense, namely, its contract

for the disposal of the matter creating the nuisance, and offered to show that another was guilty, not petitioner, which offers were refused by the Court, thus making petitioner liable without fault in a case where the maxim *damnum obsque injuria* has no relevance or place.

Conclusion

An unnecessary and confusing situation is created by the decisions of the Federal Court and the several State courts that follow the same view, and the diametrically opposite decision of the California court in the present case; by the ambiguity and inconsistency of the several acts of the State of California first allowing municipalities to contract for the disposal of sewage and then limiting and qualifying that right by the provisions of the Health and Safety Code; and by the denial of petitioner's offer to present a defense to an action, which amounts to a denial of petitioner's day in court.

It is noteworthy that the District Court of Appeal, in its decision (R. 289) cited no authority, either by case or text, to support its theory of the case. The only cases cited were those cited by petitioner and which were allegedly distinguished by said court.

The present action is of great public importance in Southern California, involving upwards of three million people and the expenditure by the cities involved of approximately thirty million dollars.

It is submitted that this Court should take jurisdiction of this cause in order to settle this important question of

law, and to preserve to petitioner its rights under the Constitution of the United States.

Respectfully submitted,

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(7791)

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES.

STATUTES

IN THE

Supreme Court of the United States

October Term, 1948
No. 204

CITY OF VERNON, a municipal corporation, its defendant officers and employees,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Respondent opposes the granting of a Writ of Certiorari herein upon the ground that no federal question is involved. The contentions made and the replies thereto are similar to those in the companion case of *City of Culver City v. State of California,* No. 205. However, because the material has been presented in a different manner in the petitions, it was deemed advisable by respondent to file separate briefs. As to items 1, 3, 4 and 5, the arguments are identical. Item 2 is essentially the same.

Petitioners' Claim of Jurisdiction.

Petitioners claim jurisdiction under section 237(b) of the Judicial Code, 28 U. S. C. A. 344(b). The petitioners assert that the District Court of Appeal of California has decided a federal question of substance not heretofore determined by this court (Supreme Court Rule 38(5)(a)); and that the trial court and the District Court of Appeal have denied the petitioners a right, privilege and immunity which petitioners set up under the due process clause of the Fourteenth Amendment of the United States Constitution.

Under a decree the petitioners and numerous other cities, including the City of Los Angeles, and their respective officers, were required to abate a nuisance caused by the discharge of sewage into Santa Monica Bay. Under California law cities were permitted to make contracts with other cities and governmental instrumentalities to carry out their functions. Pursuant to these laws contracts were entered into for the discharge of sewage of the various cities through a trunk line, "treatment" plant and submarine tube in Santa Monica Bay.

It is only under the authority of these various laws relating to the joint powers of cities that the petitioners and other cities are authorized to make such contracts. One city may act on behalf of all others. (*City of Oakland v. Williams,* 15 Cal. 2d 542, 103 P. 2d 168.) The petitioners have asserted that they are exempt from all liability for the creation of the nuisance by reason of their

contracts with the City of Los Angeles. The District Court of Appeal stated:

> "This is a proceeding initiated by the people of the State of California on behalf of the state itself, and on behalf of the State Department of Public Health, as well as other state agencies, against all named defendants, to abate a public nuisance. Therefore, the court rightfully refrained from passing upon any of the rights, obligations or liabilities affecting the various defendants by reason of their contractual relations with each other, and left those matters open for future adjudication in a proper proceeding. Although the aforesaid contracts concerned the disposal of sewage, the court would not be justified in this action to adjudicate the rights existing between the various appellants by reason of their contracts one with the other. In so far as the judgment herein is concerned, if any of the appellants have any rights against the city of Los Angeles, or *vice versa,* by reason of any existing contract, such rights have been preserved and may be enforced in a proper action. All of appellants' property and rights were preserved to them and the judgment in the instant action does not impair or violate any of their constitutional rights."

Thus it will be seen that the petitioners have not been deprived of any right, privilege or immunity whatever, whether claimed under the due process clause or otherwise, but on the contrary all the rights, privileges, immunities as well as obligations of all parties to the various contracts, including the City of Los Angeles, have been

preserved, and have not been affected in any way whatever.

It is claimed by petitioners that the District Court of Appeal has decided a federal question of substance not heretofore determined by this court. This claim is made on the ground that the decision in this case is in conflict with *Carmichael v. City of Texarkana, et al.* (1902), 94 Fed. 561 (District Court), and 116 Fed. 845 (C. C. A. 8th Circuit). It will be pointed out later that there is no conflict between the *Carmichael* case and the instant case.

The Question Presented.

The respondent disagrees with the statement of question presented by the petitioner. The question should read:

Where a state law authorizes municipalities to contract together to operate a joint enterprise, and where one may act on behalf of all in carrying out such joint enterprise, and where the state has sued (first) for the common law abatement of a nuisance caused by such enterprise, being for sewage disposal, and (second) for the enforcement of state laws relating to sewage disposal, may a city complain that its property is taken without due process of law where the state courts hold that such contracts are not a defense to the maintenance of the nuisance and failure to comply with the statutes, but hold that if there are any rights, obligations, liabilities or privileges by reason of such contracts between the cities themselves that such rights may be litigated in independent proceedings between the respective contracting parties.

ARGUMENT.

Summary of Argument.

1. No federal question can be raised under the due process clause for there has been no actual impairment of right or property.

2. A municipality cannot urge that a state has violated the due process clause.

3. When parties have been fully heard in the regular course of judicial proceedings, the alleged deprivation of property by judicial decision does not ordinarily raise a federal question.

4. No federal question is involved when the judgment of the state court rests on adequate and independent state grounds.

5. A city cannot escape a primary liability by making a contract.

6. The court ordered the nuisance abated and ordered treatment works to be constructed, but did not dictate or prescribe the means or facilities, or that any particular plant be built by the petitioners.

7. The contention that the statutes of California requiring a permit from the State Board of Public Health for the treatment or discharge of sewage impairs the obligation of contracts has not been raised previously in this proceeding; furthermore, such contention cannot be raised by a municipality against the state.

8. The determination of the question of joint liability for maintaining a public nuisance is not a federal question of substance under rule 38(5)(a) of the rules of the Supreme Court.

I.

No Federal Question Can Be Raised Under the Due Process Clause for There Has Been No Impairment of Right or Property.

It is the contention of the petitioners that the State of California by a judicial decision has deprived the petitioners of property without due process of law. The holding of the court has been set out hereinabove. It has been previously held by this court that if the action of the State court did not affect the right or property, but left it as it was before the litigation, the judgment did not deprive the appellant of any right, privilege or immunities secured by the Constitution or laws of the United States.

Abbott v. Tacoma Bank of Commerce (1899), 175 U. S. 409, 20 S. Ct. 153, 44 L. Ed. 217.

II.

A Municipality Cannot Urge That a State Has Violated the Due Process Clause.

It is established in this court that a municipal subdivision of the state is not a person within the protection of the due process clause, and cannot urge that the laws of the state violate the due process clause.

Twin Falls County, State of Idaho v. Henderson (1939), 305 U. S. 568, 59 S. Ct. 149, 83 L. Ed. 358;

Trenton v. New Jersey (1923), 262 U. S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A. L. R. 1471.

In the latter case this court pointed out that in this respect there was no distinction between governmental and proprietary rights.

The power of the state and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment.

Risty et al. v. Chicago R. I. & P. Railway Co., 270 U. S. 378, 390, 46 S. Ct. 236, 70 L. Ed. 641.

III.

When Parties Have Been Fully Heard in the Regular Course of Judicial Proceedings, the Alleged Deprivation of Property by Judicial Decision Does Not Ordinarily Raise a Federal Question.

This court has accepted jurisdiction in numerous cases involving the due process clause based upon action of a state through its court or judicial officers. Such cases involve extraordinary situations such as irregularity in judicial proceedings. The usual rule is that alleged impairment of any right without due process of law by judicial decision does not raise a federal question.

Cross Lake Shooting & Fishing Club v. Louisiana (1912), 224 U. S. 632, 32 S. Ct. 577, 579-580, 56 L. Ed. 924;

Kryger v. Wilson (1916), 242 U. S. 171, 37 S. Ct. 34, 61 L. Ed. 229.

The Constitution does not guarantee that decisions of the state court shall be free from error, or require that their pronouncement shall be consistent.

Worcester County Trust Co. v. Riley (1937), 302 U. S. 292, 58 S. Ct. 185, 82 L. Ed. 268.

When parties have been fully heard in the regular course of judicial proceedings, an alleged erroneous decision of the State court does not deprive the unsuccessful party of

his property without due process of law, within the Fourteenth Amendment of the Constitution.

Central Land Co. v. Laitley (1895), 195 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91.

It is not conceded that there is any error in the decision of the State court.

IV.

No Federal Question Is Involved When the Judgment of the State Court Rests on Adequate and Independent State Grounds.

It has been pointed out that there was no actual impairment of right or property by the decision of the State court. The decision of the State court was not based on any federal question at all, but on the contrary was based on adequate and independent state grounds. The decision of the State court was based upon two grounds: first, upon the specific statutory provisions of the state law relating to the discharge and treatment of sewage, and second, upon the abatement of a public nuisance. No federal question was passed upon nor had to be passed upon to decide the case. It has been repeatedly determined that to give this court jurisdiction it must appear affirmatively, not only that the federal question was presented for decision, but also that its decision was necessary to a determination of the cause, and that it was actually decided, or that judgment could not have been given without deciding it.

Wilson v. Cook, 327 U. S. 474, 480, 66 S. Ct. 663,

V.

A City Cannot Escape a Primary Liability by Making a Contract.

The principal contention of the petitioners is that they should have been held to have escaped liability for the discharge of their sewage by reason of their contracts with the City of Los Angeles. The City of Los Angeles, they maintain, was obligated at its own cost and expense to provide the necessary work for sewage disposal and to maintain such work in proper condition. The petitioners further contend that when those disposal works were out of repair, were worn out, and had become inadequate, the responsibility was solely that of the City of Los Angeles. The screening plant (sometimes called a treatment plant), and submarine tube was adequate for the population it served only for a few years after it was constructed and placed in operation in 1925. This system now serves approximately three times that number of people, but the screening plant has not been enlarged. If the responsibility were solely that of the City of Los Angeles, as the petitioners contend, then the Superior Court and the District Court of Appeal erred in holding the petitioners and other cities jointly responsible for the creation of a public nuisance in the operation of the present sewage disposal system. The record, however, shows that the petitioners and all other cities were jointly engaged in a common enterprise. The fact that the screening plant and submarine tube were under the sole control of the City of Los Angeles is not relevant to the issue. It has been established in

City of Oakland v. Williams, 15 Cal. 2d 542, 103 P. 2d 168, that cities conducting joint enterprises under the joint powers act may provide that the employees of one of them shall serve for all and that normal governmental processes of the city so selected shall prevail for the management of the enterprise. The petitioners have justified the legality of their contracts with the City of Los Angeles. Indeed, such contracts were valid only by virtue of these statutes. (Statutes of 1909, p. 67; Deering's Gen. Laws, Act 5992; Joint Powers Act, Statutes of 1921, p. 542; Deering's Gen. Laws, Act 1801.)[1] Whatever powers the City of Vernon and the City of Culver City would have within their boundaries, they have no general authority to act outside their limits in the absence of the statute.

Since the only law which would permit the disposition of sewage by Los Angeles in conjunction with other agencies was the Joint Powers Act, the court was justified in deciding that the parties were engaged in a joint enterprise, and hence are jointly liable for its result.

It therefore follows that the City of Vernon and the City of Culver City and the other cities which were joined as defendants in this proceeding were engaged as a matter of law as well as a matter of fact in a joint enterprise and are therefore jointly liable. The cases of *Carmichael v. City of Texarkana,* and other similar cases, under such circumstances do not support the contention made by the

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[1]Pertinent portions of these statutes are printed in the Supplement to the Petition in case No. 205, pages 41-48.

petitioners. The City of Texarkana owed a duty to its inhabitants; but the City of Los Angeles owed no duty to the City of Vernon nor the City of Culver City to dispose of such cities' sewage.

VI.

The Court Ordered the Nuisance Abated and Ordered Treatment Works to Be Constructed, but Did Not Dictate or Prescribe the Means or Facilities, or That Any Particular Plant Be Built by the Petitioners.

The petitioners strenuously contend that the State court erred in giving the petitioners the privilege of joining with the City of Los Angeles in the construction of a new treatment plant which had been approved by the State Board of Public Health. In lieu thereof the petitioners could build their own treatment plant, providing such treatment plant disposed of sewage in a safe and sanitary manner without creating a nuisance and was approved by the State Board of Public Health as required by state law. It appears that the privilege of joining with the City of Los Angeles would be more economical for each city, including the City of Vernon and the City of Culver City than for each city to build its own separate treatment and disposal plant. It is submitted that the petitioners are not required to accept this privilege. The fact that a privilege was made available to them certainly does not invalidate the decision.

VII.

The Contention That the Statutes of California Requiring a Permit From the State Board of Health for the Treatment or Discharge of Sewage Impairs the Obligation of Contracts Has Not Been Previously Raised in This Proceeding; Furthermore, Such Contention Cannot Be Raised by a Municipality Against the State.

The petitioners, for the first time in this proceeding, contend that the statutes of California requiring a permit for the treatment and discharge of sewage impairs the obligation of contracts.[2] (Petition and Brief pp. 32-36.) It is well established that a claim not asserted in the State court will not be considered on certiorari to this court.

> *Wilson v. Cook*, 327 U. S. 474, 483, 66 S. Ct. 663, 90 L. Ed. 793.

Aside from the fact that this point has not been raised in the State court, it has been held by this court numerous times that the regulation by the state of cities is not invalid as impairing the obligation of contracts.

> *City of Pawhuska v. Pawhuska Oil & Gas Co. et al.*, 250 U. S. 394, 39 S. Ct. 526, 63 L. Ed. 1054.

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[2]Pertinent portions of the statute are printed in the supplement to the petition in case No. 205, at pages 51-53.

VIII.

The Determination of the Question of Joint Liability for Maintaining a Public Nuisance Is Not a Federal Question of Substance Under Rule 38(5)(a) of the Rules of the Supreme Court.

The petitioners contend that a federal question of substance under Rule 38(5)(a) of the Rules of the Supreme Court is created by the decision of the District Court of Appeal in its apparent disagreement with the case of *Carmichael v. City of Texarkana, et al.* (1902), 94 Fed. 561 (Dist. Ct.), 116 Fed. 845 (Circuit Ct.). An examination of the decision of the District Court of Appeal shows that it is not in fact in conflict with the *Carmichael* case. Even if it were in conflict with the *Carmichael* case, a federal question of substance has not been raised. The jurisdiction of the federal court in the *Carmichael* case was based upon a diversity of citizenship pursuant to 28 U. S. C. A. 71, and was not based upon an actual dispute between the parties as to the meaning of some constitutional provision, or law or treaty of the United States or upon the materiality of the construction of that provision, or law or treaty to a determination of the cause. It is submitted that the mere lack of uniformity between a decision of a State court and a decision of a Circuit Court of Appeals of another circuit on non-federal grounds does not give rise to a federal question of substance under the rules of the Supreme Court.

Conclusion.

We submit that no constitutional question is involved in this proceeding; that the rights of the petitioners in any contracts with the City of Los Angeles have been carefully preserved, not only as to the petitioners but also as to the City of Los Angeles; that a municipality as an agent of the state cannot, against the state, raise a question under the due process clause; and finally that no federal question of substance under the provisions of Rule 38(5)(a) is shown in the petition for the Writ. The respondent respectfully requests that the Writ be denied.

Respectfully submitted,

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